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In The

Supreme Court of the United States

October Term, 1992

LEONARD L. GUMPORT, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines,

Cross-Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,

Cross-Respondent.

Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, despite the filing and publication requirements of the Interstate Commerce Act, 49 U.S.C. §§ 10761(a) and 10762(a)(1), a motor common carrier must adhere to a discount tariff that contains individualized discount rates for specific shippers whose identities are deliberately concealed by numerical codes, the key for which is neither filed with the Interstate Commerce Commission nor open for public inspection.

2. Whether the filing and publication requirements of the Interstate Commerce Act, 49 U.S.C. §§ 10761(a) and 10762(a)(1), preclude the Interstate Commerce Commission from obtaining an injunction that requires the trustee of a bankrupt motor common carrier to adhere to secret-coded discount rates.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the Interstate Commerce Commission ("ICC") and Leonard L. Gumport, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines ("Trustee").[1]

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[1] Although the ICC's complaint named Transcon Lines, the Chapter 7 debtor, as a party, it was not served and did not appear or otherwise participate in the proceedings. Transcon Lines was a wholly-owned subsidiary of Transcon, Incorporated, a New York Stock Exchange traded company, until April 1990, when it became a wholly-owned subsidiary of Growth Financial Corp. The Trustee represents the estate of Transcon Lines under 11 U.S.C. § 323(a).

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v.

INTERSTATE COMMERCE COMMISSION,

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**Cross-Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

CROSS-PETITION FOR WRIT OF CERTIORARI

The Trustee cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, amended on October 23, 1992 (ICC App. 28a), and on December 10, 1992 (ICC App. 29a), was amended again on April 5,

1993, by striking the December 10, 1992 amendment, and by restoring the opinion to its October 23, 1992 form. The opinion in that form is included in the Appendix to the ICC's petition at 1a. The April 5, 1993 order is reprinted in the appendix to this cross-petition ("Trustee's App.," *infra*, at 4a-8a).

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1992. Cross-petitions for rehearing filed by the ICC and the Trustee were denied on November 25, 1992. Two additional timely petitions for rehearing filed by the Trustee were denied on April 5, 1993. Trustee's App. at 4a-5a. This cross-petition is therefore timely under S. Ct. R. 13.5. The Trustee disputes the ICC's suggestion that the time within which to petition for a writ of certiorari commenced to run on November 25, 1992, not April 5, 1993, when the Trustee's two remaining petitions for rehearing were denied by the court of appeals. Even in that case, however, the Trustee's cross-petition is filed within 30 days after receipt of the ICC's petition on March 25, 1993, and is timely as a conditional cross-petition under S. Ct. R. 12.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions of the Interstate Commerce Act (the "Act"), 49 U.S.C. § 10101 *et seq.*, reprinted

in the ICC's Appendix, other pertinent provisions of the Act and the ICC's regulation authorizing rates for single shippers, 49 C.F.R. § 1312.14(a)(3), are set forth in the Trustee's App. at 1a-3a.

STATEMENT OF THE CASE

The Trustee has filed contemporaneously with this cross-petition for a writ of certiorari a brief in opposition to the ICC's petition for a writ of certiorari. The Trustee's opposition includes a statement of the case that is relevant to this cross-petition, and which the Trustee hereby incorporates by reference.[2]

As noted in that statement, this case arises out of an action filed by the ICC to enjoin the Trustee from collecting undercharges from shippers who failed to pay under secret-coded discount rates within ninety days from the date of shipment, as required by Transcon's duly filed loss-of-discount tariff. Under that tariff, shippers who failed to pay on time owed Transcon's full tariff charges. The ICC contended that the loss-of-discount tariff could not be enforced because Transcon had failed to comply with certain credit regulations adopted by the ICC.

The ICC and the Trustee filed cross motions for summary judgment. Following the ICC's stipulation that there was no dispute as to any material fact, the district court granted summary judgment for the Trustee on two grounds:

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[2] *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, § 6.36, at 387 (6th ed. 1986).

(1) that the ICC's credit regulations could not be enforced to the extent that they undermined the statutory filed-rate doctrine codified at 49 U.S.C. § 10761(a); and, as a second, alternate ground, (2) that the secret-coded discount rates violated the publication requirement of the Act, 49 U.S.C. §§ 10761(a) and 10762(a)(1). The ICC appealed from the summary judgment. The court of appeals affirmed on the first ground,[3] but reversed on the second, alternate ground. The latter holding is at issue in this cross-petition.

Transcon filed a variety of rates with the ICC. Its base rates were derived from a combination of "class rates"[4] and "bureau rates."[5] In addition, Transcon filed individualized discount rates for single shippers; the discounts were expressed as a percentage of the filed bureau rates. Ninety percent of all discounts given by Transcon were listed in a separate tariff filed with the ICC labelled "TCON 625." In over 98% of the discounts listed in TCON 625, the individual shippers receiving the discounts were identified only by indecipherable numerical codes. The

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[3] This is the subject of the ICC's petition and the Trustee's brief in opposition.

[4] Transcon's "class rates" came from a tariff filed with the ICC on behalf of Transcon and other carriers by the National Motor Freight Traffic Association, Inc. That tariff – the National Motor Freight Classification ("NMFC") – classified by transportation characteristics commodities transported by carriers. Each commodity is assigned a numerical designation called a "class" or rating on the basis of those characteristics.

[5] Transcon's "bureau rates" also came from tariffs filed with the ICC on behalf of Transcon and other carriers by carrier "bureaus." The bureau rates, in turn, provide the means of calculating the cost of shipping the goods classified in the NMFC between any two points in the United States.

key to the numerical codes was neither filed with the ICC nor open to public inspection. This left shippers no way to determine whether the rates Transcon gave them were higher, lower or the same as the rates Transcon gave the shippers' competitors.

The court of appeals "admit[ted] to being troubled by the ICC's policy of allowing codes alone to identify shippers," explaining that "[s]uch a practice leads to secrecy, and secrecy makes possible discrimination in rate-setting." ICC App. at 21a. Nevertheless, and while conceding that a carrier has standing to challenge the "legality" of its own rates, *id.* at 22a, the court of appeals concluded that the Trustee lacked standing to challenge the secret-coded rates in this case because he was challenging their "lawfulness," not their "legality." The court stated:

> Transcon, as a carrier, lacks standing to challenge the lawfulness [of] its own rates, for two reasons: (1) a carrier cannot obtain reparations from a shipper for undercharges; (2) a carrier's interests are not within the zone of interests protected by the Act."

Id.

On this basis, the court of appeals reversed and remanded to the district court for entry of the injunction sought by the ICC precluding the Trustee from collecting undercharges on the grounds of the illegality of the secret-coded discount rates. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

The Trustee and the ICC agree that this case involves a "significant enforcement action," ICC Petition at 8, but disagree about the reasons for its significance. In truth, the ICC's action is significant because it subverts this Court's decision in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (*"Maislin"*), and forces the Trustee to adhere to a discount tariff that contains secretly negotiated discount rates between Transcon and specific shippers whose identities are deliberately concealed by numerical codes. By concluding that the Trustee lacked standing to challenge the secret-coded discount rates, the court of appeals has effectively reinstated the use of secret negotiated rates that this Court invalidated less than three years ago in *Maislin*. It also has undermined the rate stabilization policies of the filed rate doctrine. Rate destabilization means that Transcon's bankruptcy will be followed by bankruptcies of other carriers.

By refusing on standing grounds to address the validity of the illegal secret-coded discount rates,[6] the court

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[6] Notably, the ICC, which is charged with the administration of the Act, did not raise the standing issue; it was raised by the court of appeals, *sua sponte*. In any event, the court of appeals seriously erred in concluding that the Trustee lacked standing. The Trustee challenged the *"legality"* of those rates, not just their "lawfulness." Specifically, the Trustee challenged the rates as *illegal* on the grounds that they were not duly filed and published, in violation of the Act. *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986) (*"RCCC"*). This Court's decision in *Maislin* makes clear that a carrier has standing to challenge the legality of its own rates.

of appeals forced the Trustee to adhere to secret negotiated rates to the detriment of the Transcon estate, whose thousands of creditors include former employees, health and welfare pension funds, trade creditors, and state and local governments seeking reimbursement for environmental clean-up work at truck terminals throughout the United States.

The published opinion of the court of appeals undermines the Act. For almost one hundred years, this Court and the ICC uniformly held that rates for individual shippers were *per se* discriminatory and violated the Act. In 1984, during the period of the ICC's attempts to abolish the filed rate doctrine, which culminated in the adoption of the *Negotiated Rates* policy[7] later struck down by this Court in *Maislin*, the ICC amended its tariff regulations to permit the filing and publication of tariffs which contained rates available *only* for single shippers. In 1986, the ICC amended those regulations again, this time by authorizing the use of secret "shipper account codes" in tariff filings. Thus, in the space of just two years, the ICC turned the Act's provisions on tariff filing and Congressional intent on the same subject completely on their head – recasting the scheme from one designed to be non-discriminatory and open, to one that encourages the kind of secret rate making for favored shippers that the Act was intended to prohibit.

For these reasons, the Trustee's cross-petition should be granted and the judgment of the court of appeals should be summarily reversed.

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[7] *National Indus. Transp. League – Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986); *Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989).

A. The Court Of Appeals Improperly Declined On Standing Grounds To Decide The Merits Of The Trustee's Chalienge To The Illegal Secret-Coded Discount Rates.

The court of appeals rested its standing decision on a fine, but important distinction drawn under the Act between the "legal" rate and the "lawful" rate. Under the Act, a duly filed and published rate is deemed to be the "legal" rate. The legal rate is invariable by any agreement between the carrier and its shippers, or by any act or omission of the carrier, or on any other pretext. 49 U.S.C. § 10761; *Maislin*, 497 U.S. at 126-28. This rule, however, is subject to two exceptions: First, the legal rate is not enforceable if it is not duly filed or published, as required by the Act. A challenge of this kind is deemed to be a challenge to the rate's "legality." Citing *Maislin*, the court of appeals correctly observed that a carrier has standing to challenge the "legality" of its own rates. ICC App. at 22a. Second, the legal rate is not enforceable if that rate is "unreasonable" or "discriminatory." A challenge of this kind is deemed to be a challenge to the rate's "lawfulness."[8]

In the proceedings below, the Trustee challenged both the "legality" and the "lawfulness" of the secret-

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[8] As this Court explained in *Maislin*, " 'the legal rate was not made by the [Act] a lawful rate – it was lawful only if it was reasonable' " *Id.* at 128-29 (quoting *Arizona Grocery Co. v. Atchison Topeka, & Santa Fe Ry. Co.*, 284 U.S. 370, 384 (1932)). The Act gives shippers an express cause of action against carriers for damages in the amount of the difference between the tariff rate and the rate determined to be reasonable by the ICC. 49 U.S.C. § 11705(b)(3).

coded discount rates. He argued that the ICC could not obtain an injunction requiring him to adhere to Transcon's secret-coded discount rates because: (1) those rates were *illegal* in that they conceal the identities of the benefitted shippers by indecipherable secret codes and are not duly filed and published tariffs within the meaning of 49 U.S.C. §§ 10761(a) and 10762(a)(1); and (2) those rates were unlawful in that discount rates for individual shippers are *per se* discriminatory, in violation of 49 U.S.C § 10741, because, by definition, they are not available to all similarly situated shippers. The district court agreed with both of the Trustee's arguments. The court of appeals, however, reversed, erroneously concluding that the Trustee's entire challenge was directed solely to the rates' lawfulness, not also to their legality. This, then, is the crux of the case. If, as the Trustee contends, his challenge was to the *legality* of the rates, as well as to their lawfulness, the court of appeals' standing decision was improper, and its judgment remanding to the district court for the entry of an injunction against the Trustee should be summarily reversed and remanded with instructions to decide on the merits the Trustee's challenge to the legality of the secret-coded discount rates.

1. The Trustee Challenged Transcon's Secret-Coded Discount Rates for Individual Shippers as *Per Se* Discriminatory and as not Duly Filed and Published, in Violation of the Act; this was a Challenge both to the Legality of those Rates and to their Lawfulness.

More than one hundred years ago, Congress recognized that widespread discriminatory practices by railroads – including secret special rates for favored

shippers, drawbacks, rebates, personal concessions and favoritism – were creating inefficiency and inequality in common carriage, and that government intervention was required. As a result, in 1887 Congress passed the Act; its purpose was to secure equality of treatment for all like situated shippers, and to prohibit the discriminatory practices, which Congress condemned as "flagrant and reprehensible" forms of "arbitrary discrimination." S. Rep. No. 46, 49th Cong., 1st Sess. 188 (1886).

The Act codified a central principle of common carriage; namely that the common carrier has no right to conduct its business as a private enterprise. " 'The very name "common" carrier implies equality; it signifies common to all; the servant of the public. The adoption of the vocation carries with it the assurance imposed by one of the elementary principles of the common law, that every customer shall be served alike. . . . ' " I. L. Sharfman, *The Interstate Commerce Commission*, Part III, vol. B at 364 (1936) (quoting *In Re Underbilling*, 1 I.C.R. 813-14 (1888)).[9]

For these reasons, from its enactment in 1887, until 1984, the Act was consistently construed by the ICC,

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[9] The Act thus distinguishes between motor *common* carriers and motor *contract* carriers. A "motor common carrier" is defined by the Act as "a person holding itself out to the general public to provide vehicle transportation for compensation over regular or irregular routes." 49 U.S.C. § 10102(14). A "motor contract carrier," by contrast, is defined as "a person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons – (i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or (ii) designed to meet the distinct needs of each such person." 49 U.S.C. § 10102(15)(B).

courts and commentators as prohibiting rates for individual shippers. The ICC explained:

> [N]o portion [of the Act] is more definite or of greater public value than those provisions aimed at discrimination and preference, which under the decisions of our courts prohibit a classification of traffic upon the basis of the nature or character of consignees or consignors. A different rate may be given to the larger shipment, but it must be justified upon transportation conditions. The rate is made *as applying to the shipment, not to the shipper.*"

California Commercial Ass'n v. Wells, Fargo & Co., 14 I.C.C. 422, 428-29 (1908) (emphasis added).[10]

This Court agreed, stating in *Interstate Commerce Commission v. Delaware, Lackawanna & Western R.R. Co.*, 220 U.S. 235 (1910):

> The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting

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[10] *See also Southern Ry. Co. v. Reid*, 222 U.S. 424, 442 (1912) (carrier's rates must be "not only for one shipper or shipment, but for all shippers and shipments"); *Arizona Grocery Co. v. Atchison, Topeka, and Santa Fe Ry. Co.*, 284 U.S. 370, 384 (1932) (legal rates must be charged to all shippers alike); I. L. Sharfman, *The Interstate Commerce Commission*, Part III, vol. B at 361 (1936) (" '[T]he great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism' ") (citations omitted).

> them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement.

Id. at 252.[11]

The Act codifies these principles, prohibiting all common carriers from subjecting any "person, place, port, or type of traffic to unreasonable discrimination." 49 U.S.C. § 10741(b); Trustee's App. at 1a.

In 1984, the ICC veered sharply from this established precedent by amending its regulations to permit tariffs for individual shippers. *See* 49 C.F.R. § 1312.14(a)(3); Trustee's App. at 3a. Citing the passage of the Motor Carrier Act of 1980 ("MCA"), Pub. L. 96-296, 94 Stat. 793, July 1, 1980, the ICC said its new rule was consistent with Congress' intent to deregulate the trucking industry. *See* Ex Parte No. MC-158, *Rates For a Named Shipper or Receiver*, 367 I.C.C. 959, 964 (1984).

The ICC was wrong.[12] The ICC used the same justification for adopting the *Negotiated Rates* policy, under

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[11] The Court in *Delaware* was applying the prohibitions against unreasonable discrimination in Sections 2 and 3 of the original Act. Those sections have been recodified and are now found at 49 U.S.C. §§ 10741(a) and (b).

[12] Congress did not intend that the MCA would effect complete deregulation of the trucking industry. Congress emphasized the need for continued regulation, and admonished the ICC to "stay within the powers specifically vested in it by the revised law." H.R. Rep. No. 1069, 96th Cong., 2d Sess. at 11,

which the ICC found it to be an unreasonable practice to negotiate an unfiled rate and subsequently seek to collect the higher filed rate. The ICC had argued that, in light of the more competitive environment, strict adherence to the filed rate doctrine was inappropriate and "unnecessary to deter discrimination today." *Maislin*, 497 U.S. at 134.

This Court in *Maislin* rejected both the *Negotiated Rates* policy and the ICC's justification for it. This Court explained that "[g]eneralized congressional exhortations to 'increase competition' cannot provide the ICC authority to alter the well-established statutory filed rate requirements," and warned the ICC that it "does not have the power to adopt a policy that directly conflicts with its governing statute." *Maislin*, 497 U.S. at 134-35.

Even the ICC's internal Office of Compliance and Consumer Assistance ("OCCA") condemned the rule allowing individual shipper rates as "*per se* discriminatory." OCCA explained:

> [A] published rate which simply records the fact that a discount has been granted to a particular shipper arguably is *not* a common carrier rate under the 1980 MCA. No other shipper, not even

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reprinted in 1980 U.S. Code Cong. & Admin. News 2293. The stated purpose of the National Transportation Policy, as amended by the MCA, is the "impartial regulation of the modes of transportation," and Congress directed the ICC to "encourage sound economic conditions in transportation, including sound economic conditions among carriers," and to "encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices." *See* 49 U.S.C. §§ 10101(a)(1)(C) and (D).

> a shipper which tenders the specified commodity, in the requisite quantity, from the named origin to the named destination, could ship under such a personalized rate. In OCCA'S view, these discounts are *per se* discriminatory. *Such personalized rates are in conflict with the basic concept of common carrier ratemaking.*

Comments of Office of Compliance and Consumer Assistance Re: Ex Parte No. 196, Investigation of Motor Carrier Collective Ratemaking and Related Procedures or Practices at 21 (emphasis added)("*OCCA Comments*"); Resp. SER, Vol. III at 292.

Admittedly, the Trustee's challenge to the discount rates as *per se* discriminatory was a challenge to the rates' lawfulness. As the court of appeals conceded, however, the Trustee also argued that the rates were not duly published because the identities of the shippers were deliberately concealed with indecipherable numerical codes, the key for which was neither filed with the ICC nor open for public inspection. ICC App. at 21a. This was plainly a challenge to the *legality* of the rates, and the court of appeals erred by holding otherwise. *See Transcript of Proceedings*, ICC App. at 45a-46a ("[the Trustee] argues that . . . a rate that keeps the customer's name hidden from competitors and from the [ICC] is illegal.")

Congress recognized that the surest means of securing equality in transportation was to require publicity of rates.[13] Thus, the Act requires the filing and publication

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[13] *See* S. Rep. No. 46, 49th Cong., 1st Sess. 189 (1886). The Report stated, "In the judgment of the committee one of the chief purposes of any legislation for the regulation of inter-State

of tariffs, making information on rates and services readily available to all shippers. 49 U.S.C. § 10762(a)(1). This Court has held that, under the Act, the only "legal" rate is the rate which is duly published and filed. *Maislin*, 497 U.S. at 126.

Courts have strictly adhered to the publication requirement, striking down any attempts to avoid the publication rule. For example, in *RCCC*, the ICC had approved a tariff rule allowing freight forwarders to charge unpublished rates based on averaging the prior charges to a particular shipper ("averaging rule"). The plaintiffs challenged the rule as a violation of the publication requirement. Then Judge Scalia writing for the D.C.

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commerce should be to secure the fullest publicity, both as to the charges made by common carriers and as to the manner in which their business is conducted. The business of a common carrier concerns practically the whole public, and the carrier exercises in some respects a public function. The people rightly feel that its charges should be public and open to all alike. . . ." *See also United States v. Chicago & Alton Ry. Co.*, 148 F. 646, 648 (N.D. Ill. 1906), *aff'd* on other grounds 156 F. 558 (7th Cir. 1907), *aff'd* 212 U.S. 563 (1909), where the court read into 49 U.S.C. § 10762(a)(1) the requirement that shippers' names be disclosed in tariff filings, and explained:

> The requirement of publication is imposed in order that the man having freight to ship may ascertain by an inspection of the schedules exactly what will be the cost to him of the transportation of his property; and not only so, but the law gives him another and a very valuable right, namely, the right to know, by an inspection of the same schedule, exactly what will be the cost to his competitor of the transportation of his competitor's property.

Circuit agreed, holding that tariffs based on the averaging rule left shippers with no way to determine the actual rate charged. "Under . . . the 'averaging rule' . . . the carrier's competitors do not even know how the 'averaging' is conducted, and the shipper does not know whether it is conducted in the same fashion for him as it is for other shippers." 793 F.2d at 380.[14]

In 1986, in the face of established precedent on the importance of the publication requirement in securing equality in transportation, the ICC endorsed the use of secret shipper account codes in tariffs. It justified this departure from precedent on the bare ground that, because the ICC had been routinely granting individual requests for permission to use the secret codes, "there appears to be no good reason to continue to require individual treatment of a tariff publishing practice that has now become standard." *Outstanding Relief For "Shipper Account Codes" – Individual Motor Common Carriers and Freight Forwarders*, Special Tariff Authority No. 86-639, (April 29, 1986), p.2. *See also Petition for Declaratory Order – Discounts and Customer Account Codes*, 8 I.C.C. 2d 47 (1991) (same).

OCCA, over whose objection the ICC authorized individual shipper tariffs, recognized that the ICC's endorsement of secret coded rates directly conflicted with

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[14] *RCCC* made clear that, without the filing and publication requirement, "it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory . . . and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates." *Id.* at 379 (citations omitted).

the Act. OCCA explained: "[B]ecause 'code' discounting conceals the identity of the benefitting shipper, its proliferation challenges a principal safeguard against discrimination recognized in *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984), i.e., the complaint process," and concluded:

> [D]iscounting practices by LTL carriers based on named shipper, shipper account code, and range of discount tariffs run afoul of the ICA's tariff filing and anti-discrimination requirements – provisions which were basically left untouched by the MCA reform of 1980 . . . In OCCA's view, contract carrier pricing concepts have been injected into common carrier ratemaking, contrary to the MCA's statutory scheme.

OCCA Comments at 24-25; Resp. SER, Vol. III at 295-96.

Like the averaging rule in *RCCC*, the use of secret account codes by Transcon prevents a shipper from determining the rates applied to its competitors, or even whether a rate applies to the shipper itself.[15] These facts underscore why the names and identities of shippers to whom rates apply are necessary tariff components. So does the ICC's own "four corners rule." That rule, which the ICC has invoked to prevent trustees from collecting undercharges, was applied in *Eastman Kodak Company – Petition for Declaratory Order – Certain Rates and Practices*

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[15] The record below included a letter from Lawrence C. Herzig, Chief, Section of Rates and Informal Cases of the ICC, to a shipper explaining that the ICC is unable to assist the shipper determine what discount applied to that shipper, stating "only you and the carrier would have knowledge as to what customer code was assigned to your account."

of Advanced United Expressways, Inc., 1991 Fed. Carr. Cas. (CCH), ¶ 37,928 (July 8, 1991) ("*Kodak*"). There, the ICC invalidated a carrier's discount tariff because limitations on the application of the discount were contained outside the tariff in "letters of participation" of the shippers. The ICC invalidated the tariff because these limitations could not be determined from the "four corners" of the tariff, and observed that "after *Maislin*, full disclosure concerning the discount to be published in tariffs and filed with the [ICC] is required." *Id.* at 47,486 and n.12. The rule was also applied in *Jasper Wyman & Son, et al. – Petition For Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C. 2d 246 (1992) (invalidating tariff because distance rates did not contain method to determine actual mileage between shipping points, and because the carrier had not properly participated in a filed distance guide referred to in the tariff that supplied the missing information); and in *Wonderoast, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Transportation Systems International, Inc.*, 8 I.C.C. 2d 272 (1992) (invalidating tariff that failed to define commodity account codes).

In addition to the "four corners rule," other decisions of the ICC regarding rate codes establish that Transcon's secret-coded rates violate the Act's publication requirement. In those decisions, the ICC has authorized the use of codes *only* where the codes are explained in keys included in the tariffs. For example, in Ex Parte No. 370, *Tariff Improvement*, 365 I.C.C. 43 (1981), the ICC promulgated a regulation permitting the use in tariffs of location codes *provided* that an explanation of the codes is contained in the same tariff or in a separate tariff named as a

governing publication. In *Revision of Tariff Regulations, All Carriers*, 1 I.C.C. 2d 404 (1984), the ICC restated its rule permitting location codes, and reiterated the requirement that such codes be explained. In addition, the ICC authorized the use in tariffs of *carrier codes* and abbreviations *provided* they are *explained*. The ICC stated: *"Whatever symbols are used must be explained." Id.* (emphasis added).

The Trustee established below, and the district court agreed, that the secret-coded discounts contained in TCON 625 were not duly filed and published rates within the meaning of the Act. The coded discounts were simply announcements that the shippers listed there by indecipherable numerical codes had been granted secretly negotiated discounts from the filed bureau rates. The Trustee's challenge to the secret-coded rates on this ground was a challenge to the rates' *legality* – not to their lawfulness. Indeed, because the key to the codes was neither filed with the ICC nor open to public inspection, Transcon's discounting scheme was virtually identical to a practice of personal favoritism specifically condemned by the Act, namely where: "[t]he memorandum book carried in the pocket of the general freight agent often contained the only record of the rates made to the different patrons of the road. . . . " *ICC Annual Report* at 5-6 (1887), *reprinted* in part in I. L. Sharfman, *The Interstate Commerce Commission*, Part III, vol. B at 360-61 (1936 ed.).

2. The Trustee Has Standing to Challenge Transcon's Secret-Coded Discount Rates for Individual Shippers.

As the foregoing authorities demonstrate, the Trustee challenged the legality of the secret-coded discount rates, not just their lawfulness. The district court agreed that the rates were illegal because they violated the publication requirement, and invalidated them on that basis. Because the court of appeals conceded that a carrier has standing to challenge the legality of its own rates, the court's standing holding was clearly erroneous.

For this reason, the court's observations about "zones of interest" and "reparations" were irrelevant; they are also in error. First, *Maislin* makes clear that the interests asserted by the Trustee in his challenge to the secret-coded discount rates fall within the "zone of interests" the Act is intended to protect. And the Act itself makes this clear: It proclaims that its provisions are for the benefit of carriers, their employees, and shippers alike. 49 U.S.C. § 10101.

Second, contrary to the suggestion of the court of appeals, the Trustee is not seeking "reparations" for the past application of the secret-coded discount rates. "Reparations" is a remedy afforded shippers charged an unreasonable rate. Instead, the Trustee is seeking to enforce the filed rate, which *Maislin* requires him to do. If the secret-coded discount rates were not filed and published, as the Trustee contends, then the applicable rates are Transcon's base rates, which the court of appeals conceded were duly filed and published. Under the Act, a common carrier has the right and the obligation to collect

a duly filed rate in excess of an illegal rate. *See* 49 U.S.C. § 11706(a). This Court decided that issue in *Maislin*, where the trustee was authorized to collect the difference between the unfiled negotiated rates and the higher filed rates. *Maislin*, 497 at 119.[16]

The "reparations" cases on which the court of appeals relied are therefore inapplicable. *Burlington Northern Inc. v. United States*, 459 U.S. 131 (1982), and *Union Pacific R.R. Co. v. Nevada Power Co.*, 950 F.2d 1429 (9th Cir. 1991) involved a determination of what rates should apply when reviewing courts vacate for lack of clarity ICC orders that set *future* rates. But *future* rates are not at issue in this case, and the court of appeals does not suggest otherwise. Rather, as noted, the Trustee seeks to enforce Transcon's filed rate by collecting as undercharges the difference between the amount paid under the unpublished, and therefore illegal, secret-coded discount rates and the bureau rates, which concededly are duly filed and published.

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[16] *See also Milne Truck Lines, Inc. v. Makita U.S.A., Inc.*, 970 F.2d 564 (9th Cir. 1992) (because past shipments from Cerritos were not eligible for a discount rate applicable to shipments from San Jose, the carrier's undiscounted rate applied and formed the basis for undercharges); *Friedman Bag Co., Inc. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, Inc.*, Fed. Carr. Rpts. (CCH) ¶¶ 37,986.01, 37,986.03 (May 22, 1992) (fact that tariffs upon which bankrupt carrier relied were inapplicable does not necessarily mean there is no basis for recovering any rate; if trustee can show another tariff applied, rates can be collected thereunder).

CONCLUSION

The Trustee's cross-petition for a writ of certiorari should be granted, the judgment should be summarily reversed, and the case remanded with instructions to the court of appeals to decide the merits of the Trustee's challenge to the legality of Transcon's secret-coded discount rates.

Respectfully submitted,

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APPENDIX A

Title 49, United States Code

§ 10741. Prohibitions Against Discrimination by Common Carriers.

(a) A common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.] may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered, or to be rendered, in transportation the carrier may perform under this subtitle than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.

(b) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title [49 USCS §§ et seq.] may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discriminate against the traffic of another carrier providing transportation by any mode.

(c) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter, I, II, or III of that chapter may not subject a household goods freight forwarder providing service subject to the jurisdiction of the Commission under subchapter IV of

that chapter to unreasonable discrimination whether or not the household good freight forwarder is controlled by that carrier.

(d) Differences between the rates, classifications, rules, and practices of water and rail common carriers in effect for their respective types of transportation do not constitute a violation of this section or an unfair or destructive competitive practice under this subtitle.

(e) Differences between rates, classifications, rules, and practices of rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.] do not constitute a violation of this section if such differences result from different services provided by rail carriers.

(f) This section shall not apply to –

(1) contracts approved under section 10713 of this title [49 USCS § 10713] other than as provided in subsection (d)(2)(A)(ii) and (d)(2)(B) of such section [49 USCS § 10713(d)(2)(A)(ii) and (B)];

(2) surcharges or cancellations under section 10705a of this title [49 USCS § 10705a];

(3) separate rates for distinct rail services under section 10728 of this title [49 USCS § 10728];

(4) rail rates applicable to different routes; or

(5) expenses authorized under section 10751 of this title [49 USCS § 10751], except that with respect to rates described in paragraphs (2), (3), and (4), nothing in this subsection shall affect

the authority of the Commission under this section with respect to rate relationships between ports or within the same port.

49 C.F.R. Ch. X (10-1-92 Edition)

§ 1312.14(a)(3) Statement of rates and fares.

Rates may be published to apply from or to a named plant site, construction site, or other site, if its location is identified. Rates may be published for the account of a specifically named shipper or receiver.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55036
DC #CV-91-5036 (Tx)

Interstate Commerce Commission,

Plaintiff-Appellant

vs.

Transcon Lines, a corporation; LEONARD L. GUMPORT, Chapter 7 Trustee, Defendants-Appellees

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ORDER

[Filed April 5, 1993]

Before: Robert Boochever, William A. Norris and John T. Noonan, Jr., Circuit Judges

The opinion as amended December 10, 1992 is hereby further amended by striking the amendment made December 10, 1992 and restoring the opinion, as follows:

In Slip op., p. 14392, paragraph 15 is hereby deleted and replaced by the following:

> The Trustee cannot make an end run around the limitations on the carrier's remedies and the Act's zone of interests by having a court find one filed rate unlawful and then moving to collect the other filed rate that still stands. To permit such a process would be to stand the Interstate Commerce Act on its head and give federal courts an authority over rates that has never been conceded by a statutory scheme where "court-ordered relief interferes with the

> delicate balance the Act strikes between the competing interests of shipper and carrier." *Burlington Northern*, 459 U.S. at 140.

With this amendment, the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

The parties are reminded of Circuit Rule 4.6.b. Inasmuch as the opinion has been restored to its October 23, 1992 form the court deems it highly improbable that the amendment affected by this order offers any ground for a petition for rehearing or rehearing en banc.

This court's order granting Appellant Interstate Commerce Commission's motion to stay the mandate expired on January 7, 1993. The Motion filed on March 8, 1993 of Appellant Interstate Commerce Commission to stay issuance of the mandate is **DENIED.**

The mandate shall issue forthwith.

NORRIS, J. concurring:

I concur in the order denying the petitions for rehearing and rejecting the suggestions for rehearing en banc because I agree that the Trustee has no standing to challenge the lawfulness of its own rates. I write separately to

address a related point – the Trustee's attempt to establish standing by casting its challenge as one to the legality, rather than the lawfulness, of Transcon's rates. The Trustee contends that Transcon's coded tariff was not duly filed because neither the Commission nor the public could determine from the four corners of the tariff the identity of the shipper receiving each coded discount. As a result, the Trustee would have us strike the discount tariff and enforce as the filed rate the undiscounted bureau tariff, which was part of Transcon's filing and which suffers from no similar infirmity.

I confess to some misgivings about the legality of coded discounts and am pleased that the ICC has decided to address the issue. *See Reconsideration of Special Tariff Authorities Authorizing the Publication of Customer Account Codes in Tariffs*, I.C.C. Decision No. 40888 (Jan. 5, 1993). In this case, however, we cannot reach the question. For if coded rates are not duly filed and published rates, then to the extent Transcon's rates were coded, they were not filed. That is, for shipments subject to discount because payment was made within 90 days, Transcon had no rates on file, and thus no basis for collecting undercharges. *See Wonderoast, Inc. - Petition for Declaratory Order - Certain Rates and Practices of Transportation Systems International, Inc.*, 8 I.C.C. 2d 272, 278 (1992) (undercharges not available where no rates are filed).

In an attempt to establish an alternative filed rate for these shipments, the Trustee urges us to disaggregate Transcon's filing. He argues that, once the coded discounts are stricken, the filed rate is simply the bureau rate. But the bureau rate is only part of the filed rate. For shippers who pay within 90 days, the filed rate, if one

exists, is the bureau rate less the discounts. We cannot strike the discounts and enforce the undiscounted bureau rates in their stead. We would as soon invalidate only the coded restriction on who receives the discount rate, which would leave the Trustee vulnerable to shippers seeking overcharges for discounts denied because their customer numbers were not on the filed tariff. Either way, Transcon's rate filing must be reformed if the coded discounts are invalidated. But it is the Commission that has sole discretion to craft an appropriate remedy when the rates on file do not themselves comport with the law. *Maislin Industries v. Primary Steel*, 497 U.S. 116, 133 (*citing ICC v. American Trucking Assns., Inc.*, 467 U.S. 354, 364-65 (1984); *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304, 1308, *cert. denied*, 456 U.S. 905 (1981) ("where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for any unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness or irregularity").

The Trustee contends that this analysis conflicts with the first holding of our panel's opinion, namely that shippers who neglected to pay within 90 days are liable for undercharges. But under the rules tariff, shippers who fail to pay within 90 days cannot avail themselves of the coded discounts. The rates for those shipments – undiscounted bureau rates – are filed and enforceable regardless of the status of the coded rates.

The Trustee further contends that this analysis conflicts with existing Ninth Circuit and ICC decisions, but neither case he cites supports his argument. *Friedman Bag Co., Inc. v. Max C. Pope, Trustee of the Estate of A.T.F.*

Trucking, Inc., Fed. Carr. Rptrs. (CCH) ¶¶ 37,986.01 (May 22, 1992), 1992 MCC LEXIS 61, *13-*14, recognizes that when no filed rate applies to a shipment at issue, the shipper may collect a just and reasonable rate, but that only the ICC may fashion such a remedy. *Milne Truck Lines, Inc. v. Makita U.S.A., Inc.*, 970 F.2d 564, 568 (9th Cir. 1992), applied the filed rate, rather than reforming, deconstructing, or in any other way altering the carrier's filing.

In sum, the federal courts are charged with enforcing the filed rate when one exists, but when none exists, only the ICC can fashion a remedy. If coded discounts are illegal, the ICC, not the courts, must determine whether undercharges are available.